Supreme Court, U.S.
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No. 00-268

IN THE

Supreme Court of the United States

JAYSUKH ZALAWADIA,

Petitioner,

—v.—

JANET RENO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN MICHAEL STRAUSS
(Counsel of Record)
KERRY WILLIAM BRETZ
JULES E. COVEN
BRETZ & COVEN, LLP
305 Broadway
Suite 100
New York, New York 10007
(212) 267-2555

QUESTION PRESENTED

Petitioner, a longtime lawful permanent resident of the United States, was found inadmissible based on a criminal conviction in 1995. He applied for relief from removal under 8 U.S.C. 1229b (Supp. II 1996) and 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA) denied the relief, finding that Zalawadia is statutorily ineligible for Section 1229b and that Section 1182(c) is unavailable to him because Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3009–546 (Sept. 30, 1996), repealed it effective April 1, 1997. Petitioner filed two petitions for review in the court of appeals and a petition for a writ of habeas corpus in the district court, challenging the BIA's denial of relief under 8 U.S.C. 1229b and the retroactive application of Section 304(b) and the constitutionality of its application to him. Both the court of appeals and the district court dismissed the actions for lack of jurisdiction. Petitioner appealed the district court's dismissal of his habeas petition, but the court of appeals dismissed the appeal, and Petitioner now seeks review of that order. Neither court reached the merits of Petitioner's substantive claims.

The question presented is:

1. Whether the IIRIRA repealed the jurisdiction of both the district court and the court of appeals over Petitioner's statutory and constitutional challenges to his final removal order and, if so, whether the IIRIRA violates the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is Jaysukh Zalawadia.

Respondents are Janet Reno, the Attorney General of the United States; Doris Meissner, the Commissioner of Immigration and Naturalization; Lynne Underdown, District Director of the Immigration and Naturalization Service (INS) in New Orleans; the Department of Justice; and the INS.

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IN THE

Supreme Court of the United States

No. _____

JAYSUKH ZALAWADIA,

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—v.—

JANET RENO, ET AL.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jaysukh Zalawadia respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit that dismissed his appeal from the United States District Court for the Western District of Louisiana that dismissed his petition for a writ of habeas corpus.

OPINIONS BELOW

The order of the court of appeals dismissing Petitioner's appeal from the district court's dismissal of his habeas petition (App. 1a-2a)[1] is unreported. Also unreported are the Judgment of the district court dismissing the habeas petition (App. 16a-17a), the report and rec-

[1] "App." refers to the appendix attached to this petition.

order by filing a petition for a writ of habeas corpus pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. In 1996, Congress passed two laws that restricted both the substantive eligibility of criminal aliens for relief under Section 1182(c) and the availability of judicial review for criminal aliens.

i. On April 24, 1996, AEDPA was enacted. Section 440(d) of AEDPA, 110 Stat. 1277, amended 8 U.S.C. 1182(c) to eliminate eligibility for aliens convicted of enumerated classes of crimes. In addition, AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), which had allowed aliens in custody pursuant to a deportation order to obtain review in habeas corpus proceedings, and it included a provision prohibiting judicial review of deportation orders that are based on specified crimes. AEDPA §§ 401(e) and 440(a), 110 Stat. 1268, 1276-1277.

ii. On September 30, 1996, IIRIRA was enacted. It made sweeping changes to the INA. Among the changes, it repealed Section 1182(c), *see* IIRIRA § 304(b), 110 Stat. 3009-597, and replaced it with another form of discretionary relief, "cancellation of removal." *See* 8 U.S.C. 1229b (Supp. II 1996). This change became effective on April 1, 1997.

IIRIRA also replaced the INA's judicial review provision by repealing 8 U.S.C. 1105a (1994) and amending 8 U.S.C. 1252 (Supp. II 1996). This change also became effective on April 1, 1997. *See* IIRIRA §§ 306(c)(1) and 309(a), 110 Stat. 3009-612, -625.[2] The new Section 1252

[2] IIRIRA created two sets of rules governing judicial review that are pertinent here. IIRIRA's transitional rules applied to aliens who were placed in proceedings before April 1, 1997, but who received final deportation orders on or after October 31, 1996. These rules were heavily litigated. *See, e.g., Liang v. INS*, 206 F.3d 308, 315-316 (3d Cir. 2000) (listing cases construing the transitional rules. The

provides for judicial review in the courts of appeals of all final removal orders pursuant to the Hobbs Act, 28 U.S.C. 2341-2351. *See* 8 U.S.C. 1252(a)(1) (Supp. II 1996). It also provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section," 8 U.S.C. 1252(b)(9), *i.e.*, only as provided in Section 1252(a)(1). However, Section 1252 also provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime falling within certain classes. *See* 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996).[3] Although AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), the INA habeas corpus provision, neither AEDPA nor IIRIRA mentioned the general habeas corpus statute, 28 U.S.C. 2241.

Administrative Proceedings

2. Petitioner, Jaysukh Zalawadia, was lawfully admitted to the United States from India as a permanent resident in 1988, when he was fourteen years old. His entire extended family lives in this country. On June 26, 1995, he pled guilty to two non-violent theft offenses for which he paid restitution but received no prison time.

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permanent judicial review rules apply to aliens who, like Petitioner, were placed in proceedings on or after April 1, 1997.

[3] The transitional rules included a similar prohibition on all judicial review for aliens deportable for certain classes of crimes, providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626.

Because they arose out of a single scheme of misconduct, the offenses did not render him deportable for having been convicted of a crime involving moral turpitude. *See* 8 U.S.C. 1251(a)(2)(A)(i) and (ii) (1994), recodified at 8 U.S.C. § 1227(a)(2)(A)(i) and (ii) (Supp. II 1996).

However, in November 1998, Zalawadia took a 10-day business trip abroad. When he returned on December 9, 1998, the Immigration and Naturalization Service (INS) arrested him and issued a Notice to Appear charging him with inadmissibility for having committed a crime involving moral turpitude, *see* 8 U.S.C. 1182(a)(2)(A)(i)(I) (Supp. II 1996). On January 11, 1999, an Immigration Judge (IJ) found that Zalawadia was statutorily ineligible for relief and ordered him removed. (App. 3a-5a)

Zalawadia appealed the IJ's order to the Board of Immigration Appeals (BIA). On August 6, 1999, the BIA dismissed the appeal. It held that Mr. Zalawadia did not have the requisite seven years of residence in the United States at the time he applied for Cancellation, *see* 8 U.S.C. 1229b(a), because IIRIRA contains a "stop-time" provision which provides that the period of residence is terminated when an alien commits certain offenses. *See* 8 U.S.C. 1229b(d)(1). Because Zalawadia committed his theft offense within seven years of his 1988 arrival in the United States, the Board ruled that he did not satisfy the seven-year requirement and could not apply for Cancellation. The BIA also held that Section 1182(c) is no longer available. (App. 6a-8a)

Petitions for Review in the Court of Appeals

3. On September 6, 1999, Zalawadia filed a timely Petition for Review in the United States Court of Appeals for the Fifth Circuit. He challenged the BIA's August 6,

1999, denial of relief pursuant both to Section 1229b and Section 1182(c) as both impermissibly retroactive, contrary to congressional intent, and as violating due process and equal protection. The government filed a motion to dismiss the Petition for Review on the ground that the AEDPA and IIRIRA eliminated the court of appeals' jurisdiction over petitions for review filed by aliens who are removable on criminal grounds. On October 21, 1999, in a one-sentence order, the court of appeals granted the government's motion to dismiss the petition for review for lack of jurisdiction.[4] (App. 18a-19a)

Habeas Corpus Decision in the District Court

On October 6, 1999, Zalawadia filed a Petition for a Writ of Habeas Corpus with the United States District Court for the Western District of Louisiana. Again, he challenged the denial of relief as both impermissibly retroactive and as violating due process and equal protection. On October 21, 1999, a Magistrate Judge issued a Report and Recommendation in which he recommended that the habeas petition be dismissed for lack of jurisdiction. The Magistrate Judge found that 8 U.S.C. 1252(b)(2) (Supp. II 1996) made the court of appeals the exclusive forum for obtaining review of a final removal order, that such review is not available to certain criminal aliens (citing 8 U.S.C. 1252(a)(2)(C)), and that the district court does not have jurisdiction even if review is unavailable in the court of appeals. (App. 9a-

[4] Zalawadia also filed with the BIA a motion to reconsider and reopen; the BIA denied the motion on November 9, 1999. (App. 20a-22a) On December 8, 1999, Zalawadia filed a petition for review in the Fifth Circuit challenging the order denying his motion to reconsider and reopen. The government filed a motion to dismiss the petition for lack of jurisdiction, and on February 24, 2000, the court of appeals granted the motion and dismissed the petition for review. (App. 23a-24a)

15a) The Magistrate Judge did not address the merits. Mr. Zalawadia filed timely objections to the report and recommendation. On November 16, 1999, the district court adopted the Magistrate Judge's report and recommendation and dismissed the habeas petition. (App. 16a-17a) On December 8, 1999, Zalawadia filed a timely appeal to the United States Court of Appeals for the Fifth Circuit.

Appeal of the District Court's Habeas Corpus Order

The government filed a motion to dismiss Zalawadia's appeal arguing that the Fifth Circuit had held that amendments made by the IIRIRA divested district courts of habeas jurisdiction. *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000) (5th Cir. 2000). On May 18, 2000, the court of appeals, again in a one-sentence order, granted the government's motion to dismiss the appeal from the district court habeas action. (App. 1a-2a) The instant petition for certiorari seeks review of that court of appeals judgment.

REASONS FOR GRANTING THE PETITION

For the reasons set forth in Points 1, 2, 3, and 4, *infra*, review is warranted because the circuits have split over the issue of subject matter jurisdiction, because the issue is of such exceptional importance that it will have ramifications for thousands of people, because the court of appeals' decision is incorrect, and because if there is no review of Petitioner's statutory and constitutional claims, then the 8 U.S.C. 1252 violates the Constitution.

1. The court of appeals' decision that the district courts lack subject matter jurisdiction to entertain habeas

corpus petitions under 28 U.S.C. 2241, while in accord with decisions of the Fifth and Eleventh Circuits, conflicts with decisions from the Third and Ninth Circuits. *Compare Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000) (permanent IIRIRA rules eliminated habeas jurisdiction); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (same), *cert. denied*, 120 S. Ct. 1529 (2000); *with Liang v. INS*, 206 F.3d 308 (3d Cir. 2000) (permanent rules of IIRIRA did not repeal habeas jurisdiction); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000) (same).

In *Max-George* and *Richardson*, the courts found that, although the general habeas corpus statute under 28 U.S.C. 2241 can be repealed only if done so explicitly, the courts found that Congress had partially repealed Section 2241 through the statutory scheme of 8 U.S.C. 1252 and through the use of the language "notwithstanding any other provision of law." *Max-George*, 205 F.3d at 198; *Richardson*, 180 F.3d at 1314-1315. In contrast, the courts in *Liang* and *Flores-Miramontes* found that AEDPA and IIRIRA could not have effected a partial repeal of the general habeas corpus statute because nowhere do they mention Section 2241. *Liang*, 206 F.3d at 317; *Flores-Miramontes*, 212 F.3d at 1137.

Moreover, in *Liang* and *Flores-Miramontes*, the courts expressly relied on the analysis used by those and other courts in interpreting the transitional rules. *Liang*, 206 F.3d at 320; *Flores-Miramontes*, 212 F.3d at 1137. As the Ninth Circuit noted, "[i]n some of those cases, circuit courts construed IIRIRA to preserve habeas jurisdiction even though the jurisdiction-stripping provision they were interpreting, 8 U.S.C. § 1252(g), contained even stronger language barring review than the language at issue in § 1252(a)(2)(C)." *Ibid.* This Court denied the governments applications for *certiorari* in those transi-

tional rule cases in which it was sought where courts of appeals held that habeas jurisdiction under 28 U.S.C. 2241 survived IIRIRA's transitional rules. *Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998) (habeas available), *cert. denied*, 119 S. Ct. 1140 (1999); *Henderson v. INS*, 157 F.3d 106, 117-122 (2d Cir. 1998) (same), *cert. denied sub nom Reno v. Navas*, 119 S. Ct. 1141 (1999). *Compare Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (8 U.S.C. 1252(g) eliminated statutory habeas but left "constitutional" habeas intact), *cert. denied*, 119 S. Ct. 1139 (1999)).

2. The issue presented by this case is exceptionally important. As the Third Circuit noted in *Liang*, this Court has consistently affirmed "since at least as far back as 1888 . . . the right of aliens to availability of the writ of habeas corpus in the district courts despite statutory language that restricted or eliminated judicial review of executive action in immigration matters." 206 F.3d at 320.

The government itself sought *certiorari* in the transitional rule cases because of the effect it felt those cases would have on judicial construction of the permanent rules. In the transitional cases, the government argued that this Court should grant *certiorari* precisely because the transitional rules, AEDPA § 440(a) and IIRIRA § 309(c)(4)(G), were "substantively identical" to the permanent rule, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). Petition for a Writ of Certiorari at 16 n.9, *INS v. Magana-Pizano*, No. 98-836 (filed Nov. 18, 1998), *certio rari granted, vacated and remanded*, 119 S. Ct. 1137 (1999).

3. The court of appeals dismissal of Petitioner's appeal from the district court's holding that his claims cannot be reviewed in a district court habeas action under 28 U.S.C. 2241 is contrary to settled precedent of

this Court. As noted *supra* in Point 1, the Third and Ninth Circuits relied on the clear-statement rule that habeas corpus cannot be repealed except by an express statement of such. This Court articulated the clear-statement rule in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

4. If no judicial review is available in any forum to review statutory and constitutional claims, then Section 1252 is unconstitutional. The courts, including this Court, have consistently held that the Suspension Clause requires review of both constitutional and statutory claims. The Attorney General should not be insulated from all judicial review of both statutory and constitutional claims including habeas corpus review, considering that "the traditional Great Writ was largely a remedy against executive detention." *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring).

Moreover, the Fifth Amendment's Due Process Clause requires the availability of a judicial forum for review of statutory claims because removal of lawful permanent resi dents implicates fundamental liberty interests "basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

Finally, Article III itself provides a basis for presenting the legal claims at issue here. *See Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Where individual liberty is at stake, Congress must allow a judicial forum to adjudicate questions of generally applicable statutory construction.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ALAN MICHAEL STRAUSS
(Counsel of Record)
KERRY WILLIAM BRETZ
JULES E. COVEN
BRETZ & COVEN, LLP
305 Broadway
Suite 100
New York, NY 10007
(212) 267-2555

APPENDIX

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31326
Filed May 18, 2000

JAYSUKH ZALAWADIA,

Plaintiff-Appellant,

—v.—

JANET RENO; DORIS MEISSNER; LYNNE UNDERDOWN; IMMIGRATION AND NATURALIZATION SERVICE; US DEPARTMENT OF JUSTICE,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

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Before JOLLY, JONES, and BENAVIDES, *Circuit Judges*.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss appeal for lack of jurisdiction is granted;

IT IS FURTHER ORDERED that appellees' alternative motion for an extension of 30 days after disposition of motion to dismiss appeal in which to file their brief is denied as unnecessary;

IT IS FURTHER ORDERED that appellant's motion for oral argument on appellees' motion to dismiss appeal is denied.

[ILLEGIBLE HANDWRITING]

Appendix B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Oakdale, Louisiana

File No.: A 41 490 342
January 11, 1999

In the Matter of
JAYSUKH ZALAWADIA,

Respondent.

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(2)(A)(i)(I) of the I&N Act, an alien convicted of a crime involving moral turpitude.

APPLICATION: Cancellation of removal under Section 240A(a) of the I&N Act.

ON BEHALF OF RESPONDENT:

Jonathan Saint-Preux
700 Nye Avenue, Suite 202
Irvington, New Jersey 07111

ON BEHALF OF SERVICE:

Craig A. Harlow
Assistant District Counsel
INS
Oakdale, Louisiana 71463

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of India who was admitted to the United States as an immigrant on September 7, 1988. He last arrived in the United States at Newark International Airport on December 9, 1998. At that time, he applied for admission as a returning resident alien. He was not admitted but was taken into custody by the Service for these proceedings. The basis for his inadmissibility is that on June 26, 1995, he was convicted in the State of New Jersey for the offenses of felony burglary and felony theft.

At a hearing on the issue of removability, conducted on January 11, 1999, the respondent, through counsel, admitted all of the allegations of fact contained in the Notice to Appear and conceded the respondent's removability.

As relief from removal, the respondent sought to apply for cancellation of removal. Although he declined to designate a country for removal, he declined to apply for asylum and withholding of removal.

Section 240A(a) of the Act provides that the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been an alien lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of any aggravated felony.

Section 240A(d) of the Act provides that any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a Notice to Appear under Section 239(a) or when the alien has committed an offense referred to in Section 212(a)(2) that renders the alien inadmissible to the United States under Section 212(a)(2) or removable from the United States under Section 237(a)(2) or 237(a)(4), whichever is earliest.

In the instant case, the respondent was arrested for the two offenses that form the basis for the Notice to Appear before he had resided in the United States for seven years. Therefore, he is ineligible for cancellation of removal. Accordingly, it is necessary to make the following order:

ORDER:

IT IS ORDERED that the respondent be removed from the United States to India on the charge contained in the Notice to Appear.

/s/ CHARLES A. WIEGAND III
CHARLES A. WIEGAND III
Immigration Judge

Appendix C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Date: Aug. 6, 1999
File: A41 490 342 - Oakdale

In re: JAYSUKH ZALAWADIA

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF
RESPONDENT: Irwin Berowitz, Esquire
Bretz & Associates
299 Broadway, Suite 810
New York, New York 10007-1901

ON BEHALF OF
SERVICE: Carl E. Perry
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]—Crime involving moral turpitude

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. The appeal is dismissed. The respondent, a native and citizen of India and a lawful permanent resident of the United States, appeals the decision of the Immigration Judge, dated January 11, 1999, finding the respondent deportable as charged, finding the respondent ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordering the respondent deported from the United States to India. The respondent contends on appeal that the amendments made to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), do not apply retroactively to his prior criminal conviction, that he is eligible for relief under former section 212(c) of the Act, 8 U.S.C. § 1182(c), and that the Immigration Judge committed procedural errors that violated the respondent's Due Process rights under the United States Constitution. We disagree.

We find no merit in the respondent's contentions that the recent changes to the Act made by IIRIRA are not applicable to his case. The Immigration and Naturalization Service properly placed the respondent in removal proceedings through the issuance of a Notice to Appear (Form I-862) on December 9, 1998, well after the effective date of the IIRIRA. In *Matter of Perez*,

Interim Decision 3389 (BIA 1999), this Board held that an offense described in section 240A(d)(1) of the Act is deemed to end continuous physical presence for cancellation of removal purposes as of the date of its commission, even if the offense was committed prior to the enactment of the IIRIRA. To the extent that the respondent is basing his retroactivity claim on other constitutional grounds, we lack jurisdiction to rule upon his constitutional claim. *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Similarly, we find the respondent ineligible for relief from deportation under section 212(c) of the Act because section 212(c) relief was repealed by IIRIRA and is not available in removal proceedings. Section 304(b) of the IIRIRA.

We have reviewed the respondent's claims of procedural error and find them without merit. The record reveals that the respondent, represented by counsel, conceded the factual allegations lodged against him and conceded removability as charged (Tr. at 3). The respondent has failed to show that the Immigration Judge committed any procedural error or that he suffered any prejudice in the proceedings below. *Matter of K-L-*, 20 I&N Dec. 654, 660 (BIA 1993); *Matter of Santos*, 19 I&N Dec. 105, 107-08 (BIA 1984).

We concur in the Immigration Judge's finding that the respondent is ineligible for cancellation of removal under section 240A(a) of the Act because the respondent cannot establish that he has resided continuously in the United States for 7 years after having been admitted in any status. We affirm and adopt that decision of the Immigration Judge by and for the reasons stated therein. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

For the foregoing reasons, the appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NUMBER 99-1837
SECTION "P"
Filed Oct. 21, 1999

JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

JAYSUKH ZALAWADIA

VERSUS

JANET RENO, ET AL

REPORT AND RECOMMENDATION

In accordance with the standing order of this court, this matter was referred to the undersigned Magistrate Judge for review, report, and recommendation.

STATEMENT OF CLAIM

Before the court is a petition for writ of *habeas corpus* filed on behalf of petitioner, Jaysukh Zalawadia, on October 6, 1999. Petitioner names Attorney General Janet Reno, Commissioner Doris Meissner, District Director Lynn Underdown, the Immigration and Naturalization Service and the Department of Justice as respondents.

Petitioner is a native and citizen of India who allegedly has been a lawful permanent resident of the United States since September 7, 1988. On June 26, 1995, Petitioner was convicted of burglary and felony theft in the Superior Court at Middlesex County, New Jersey for which he was sentenced to two years probation and ordered to pay restitution. On November 30, 1998, Petitioner allegedly traveled out of the United States on business. Upon his return, he was detained by the INS and on December 9, 1998 a Notice to Appear was issued charging Petitioner as an arriving alien inadmissible pursuant to INA § 212(a)(2)(A)(i)(I) as a result of his 1995 criminal convictions.

On January 11, 1999, Petitioner's counsel admitted the factual allegations contained in the Notice to Appear and conceded removability. Counsel did not contest that he was an arriving alien as charged. Accordingly, Petitioner was ordered removed to India. Petitioner's request for cancellation of removal pursuant to INA 240A(a) was denied as he was found ineligible for relief due to his inability to satisfy the residency requirements as a result of his criminal convictions.[1]

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[1] Section 240A(d) provides that "[f]or purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien . . . has committed an offense referred to in section 212(a)(2) . . . that renders the alien inadmissible to the United States under section

Petitioner appealed this decision to the Board of Immigration Appeals (BIA). On August 6, 1999, the BIA dismissed Petitioner's appeal. Petitioner's Motion to Reopen is currently pending before the BIA.

Petitioner filed a Petition for Review and a Motion to Stay Removal in the United States Court of Appeals for the Fifth Circuit. That Petition and Motion are currently pending. *See Zalawadia v. INS*, 99-60593.

Petitioner filed this application for *habeas corpus* relief on October 6, 1999 seeking to have the court (1) find that it has jurisdiction to review his claims; (2) find that his removal order is unlawful; and (3) direct that he be given the opportunity to plead to the allegation that he is an arriving alien, apply for former § 212(c) relief, and apply for § 240A relief.

After reviewing the entire record herein and applicable jurisprudence, the undersigned finds that this petition should be **DENIED AND DISMISSED**.

LAW AND ANALYSIS

I. Jurisdiction

Petitioner directly challenges the final order of removal which has been issued against him. He asserts that this court has jurisdiction to entertain his claims pursuant to a variety of statutory and constitutional provisions including 28 U.S.C, § 2241 and Article 1, § 9, Cl.2 of the United States Constitution (the "Suspension Clause").

212(a)(2). . . ." Thus, petitioner's 1995 convictions terminated his continuous residency. Accordingly, at the time he entered the United States in 1998, he had not continuously resided in the United States for 7 years as required by the statute for section 240A relief.

It is clear from the facts recited above that Petitioner's case is governed by the permanent provisions of IIRIRA.[2] The permanent provisions of IIRIRA which govern judicial review are found in INA § 242 [8 U.S.C. § 1252]. Under these provisions, the exclusive forum for obtaining review of a final order of removal is in the court of appeals. INA 242(b)(2) [8 U.S.C. § 1252(b)(2)].[3] However it should be noted that review of final removal orders does not extend to certain criminal aliens. *See* INA § 242(a)(2)(C). Section 242(a)(2)(C) states as follows:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in 212(a)(2) [8 U.S.C. § 1182(a)(2)] or 237(a)(2)(iii), (B), (C), or (D) [8 U.S.C. § 1227(a)(2)(iii), (B), (C), or (D)] or any offense covered by section 237(a)(2)(A)(ii) [8 U.S.C.

---

[2] IIRIRA established two sets of rules to govern immigration proceedings, the transitional rules and the permanent rules. The transitional rules apply to deportation/removal proceedings that "commence before . . . April 1, 1997 and conclude more than thirty days after [IIRIRA's] passage on September 30, 1996." *Requena-Rodriguez v. Pasquarell*, __ F.3d __, 1999 WL 717367, *2 (5th Cir. 1999); *Lerma de Garcia v. INS*, 141 F.3d 215, 216 (5th Cir. 1998); IIRIRA § 309(c)(1), (4).

Because the Notice to Appear was not issued until December 9, 1998, it is clear that the removal proceedings at issue in this case did not commence before April 1, 1997.

[3] INA § 242(b)(2) states in pertinent part as follows:

(2) Venue and Forum

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. . . .

> § 1227(a)(2)(ii)] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i) [8 U.S.C. § 1227(a)(2)(A)(i)].

This court has consistently held that it lacks jurisdiction to review final deportation/removal orders. *See Naidoo v. INS*, 37 F.Supp.2d 755, 762-63 (W.D.La. 1999); *Thomas v. INS*, 975 F.Supp. 840 (W.D. La. 1997); *Ozoanya v. Reno*, 979 F.Supp. 447 (W.D. La. 1997). This is true despite the fact that a Petitioner's criminal convictions may make him ineligible for review in the courts of appeals. 8 U.S.C. § 1252(a)(2)(C). Accordingly, this court finds that there is no statutory provision of the INA which grants this court jurisdiction to review Petitioner's final order of removal.

Additionally, this court notes that the preclusive language of INA § 242(a)(2)(C) seems to limit the jurisdiction of federal courts under other provisions of law, including 28 U.S.C. § 2241, to review final orders of removal for aliens who are barred from review in the court of appeals. *See Requena-Rodriguez*, 1999 WL 717367, *3-4 (discussing the need for explicit language when repealing *habeas corpus* jurisdiction).

Accordingly, this court finds that there is no statutory provision granting this court jurisdiction to review Petitioner's final order of removal. In concluding that this courts lacks jurisdiction to review Petitioner's claims, the undersigned notes the Fifth Circuit's recognition that the jurisdiction of statutory courts can be limited by Congress without constitutional problems. *Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir. 1998). In *Lerma de Garcia*, the Fifth Circuit observed that "courts created by statute have no jurisdiction other than that which has been conferred upon them by statute. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449. 12 L.Ed. 1147 (1850)." *Lerma*

de Garcia 141 F.3d at 217; *Rusu v. Reno*, 999 F.Supp. 1204, 1212 (N.D. Ill. 1998). More recently, in *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999), the Fifth Circuit declined to review the denial of a suspension of deportation noting that it lacked jurisdiction to do so because such decision was committed to the discretion of the Attorney General. In discussing the limitation of jurisdiction imposed by the INA, the Fifth Circuit stated that "the power of courts to review deportation decisions is subject to the will of Congress." *Moosa*, 171 F.3d at 10 11-12.

The INA clearly limits federal court review of deportation orders. Thus, without a specific grant of jurisdiction, this court lacks jurisdiction to consider Petitioner's claims.

II. Prematurity

Even if this court had jurisdiction to review Petitioner's claims, it is apparent that Petitioner's claims are premature. Clearly, petitioner admits that he has a petition for review pending in the United States Fifth Circuit Court of Appeal. Although the Fifth Circuit has suggested that this court may have *habeas* jurisdiction in limited circumstances, that jurisdiction is only available where direct review of a final removal order is not available. *Requena-Rodriguez v. Pasquarell*, ___ F.3d ___, 1999 WL 717367, *4 (5th Cir. 1999). In the instant case, it has not yet been determined that review in the appellate court is not available. Accordingly, Petitioner's petition should be dismissed as premature.

For the foregoing reasons, **IT IS RECOMMENDED** that this petition be **DENIED AND DISMISSED**.

Under the provisions of 28 U.S.C. Section 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have ten (10) business days from ser-

vice of this report and recommendation to file specific, written objections with the Clerk of Court. a party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. ***See, Douglass v. United Services Automobile Association*****, 79 F.3d 1415 (5th Cir. 1996).**

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 21st day of October, 1999.

/s/ ALONZO P. WILSON
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NUMBER 99-1837
SECTION "P"
Filed Nov. 16, 1999

JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

JAYSUKH ZALAWADIA

VERSUS

JANET RENO, ET AL

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the record, and a *de novo* determination of the issues, and consideration of

the objections filed herein, and having determined that the findings are correct under applicable law;

IT IS HEREBY ORDERED that this petition is DENIED AND DISMISSED.

Signed in chambers in Lake Charles, Louisiana this 16th day of November, 1999.

/s/ JAMES T. TRIMBLE, JR.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60593
Filed Oct. 21, 1999

JAYSUKH ZALAWADIA,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before

DAVIS, EMILIO M. GARZA, and DENNIS,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss petition for review for lack of jurisdiction is granted.

IT IS FURTHER ORDERED that respondent's alternative motion for an extension of time of 30 days after disposition of motion to dismiss petition in which to file the administrative record is denied.

IT IS FURTHER ORDERED that petitioner's motion for stay of deportation is denied.

Appendix G

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A41 490 342 - Oakdale
Date: Nov. 9, 1999

In re: JAYSUKH ZALAWADIA

IN REMOVAL PROCEEDINGS
MOTION

ON BEHALF OF
RESPONDENT: Matthew L. Guadagno, Esquire
Bretz & Coven
305 Broadway, Suite 100
New York, New York 10007

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]—Crime involving moral turpitude

APPLICATION: Reopening

ORDER

PER CURIAM. The respondent moves this Board to assume jurisdiction over his late-filed motion to reconsider and reopen the Board's decision, dated August 6, 1999, denying his appeal of the Immigration Judge's decision. The Board assumes jurisdiction pursuant to 8 C.F.R. 3.2(a) and the motion to reconsider and reopen is denied.

This case was previously before this Board on August 6, 1999, when we dismissed the respondent's appeal from the Immigration Judge's decision finding the respondent removable as charged and denying the respondent's request for relief from removal. The Board reviewed the respondent's procedural and substantive claims on appeal and found them without merit (Board Decision, A41-490-342, August 6, 1999). The respondent's motion to reconsider and to reopen raises many of these same claims again. We have again reviewed the respondent's procedural and substantive claims and find them without merit. The record clearly reflects that the respondent, with the assistance of counsel, pled to the factual allegations lodged against him and conceded removability as charged (Tr. at 3). Our decision in *Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998), is dispositive of the procedural claims raised by the respondent. We find the respondent's other claims without merit.

For the foregoing reasons, the motion is denied.

/s/ JOHN [ILLEGIBLE]
FOR THE BOARD

Appendix H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60854
Filed Feb. 24, 2000

JAYSUKH ZALAWADIA,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before

DAVIS, EMILIO M. GARZA, and DENNIS,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss petition for review for lack of jurisdiction is granted.

IT IS FURTHER ORDERED that respondent's alternative motion for a 30 day extension of time after disposition of motion to dismiss petition in which to file the administrative record is denied as moot.

[ILLEGIBLE HANDWRITING]

Appendix I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality

Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of

seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of

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[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 87a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 86a-89a, *infra*.

seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. 111996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(2)(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

* * * * *

(b)(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in Judicial review of a final order under this section.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—

(1) in paragraph (8), by adding "and" at the end;

(2) in paragraph (9), by striking "; and" at the end and inserting a period; and

(3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 87a, *infra*.

241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11 1996),[3] provides in pertinent part:

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[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-

208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 112 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final

order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

13. Section 240A of the Immigration and Nationality Act, 8 U.S.C. 1229b, provides in pertinent part:

(a) Cancellation of Removal for Certain Permanent Residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(d) Special Rules Relating to Continuous Residence or Physical Presence

(1) Termination of Continuous Period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2)

that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

14. U.S. Constitution, Art. III provides in pertinent part:

Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . .

15. U.S. Constitution, Amendment V provides in pertinent part:

No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

Supreme Court, U.S.
FILED
NOV 17 2000

(2)

No. 00-268

In the Supreme Court of the United States

JAYSUKH ZALAWADIA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17pp

QUESTION PRESENTED

Whether the district court had jurisdiction under 28 U.S.C. 2241 over petitioner's challenge to his final removal order.

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In the Supreme Court of the United States

No. 00-268

JAYSUKH ZALAWADIA, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported, as are the judgment of the district court (Pet. App. 16a-17a), the report and recommendation of the magistrate judge (Pet. App. 9a-15a), the decision of the Board of Immigration Appeals (Pet. App. 6a-8a), and the decision of the immigration judge (Pet. App. 3a-5a).

JURISDICTION

The order of the court of appeals was entered on May 18, 2000. The petition for a writ of certiorari was filed

on August 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years. Courts had interpreted that temporal requirement to be deemed satisfied as long as the Board of Immigration Appeals (BIA) ruled on the alien's application for relief at least seven years after he obtained that domicile. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

If the Attorney General, in the exercise of her discretion, denied relief from deportation, then the alien could challenge that denial of relief by filing a petition

for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2) (1994) (now recodified as 8 U.S.C. 1227(a)(2) (Supp. IV 1998))). Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) amended 8 U.S.C. 1105a(a)(10) (1994) to provide that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which as noted above, had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229 and 1229a (Supp. IV 1998); IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); IIRIRA § 304(a), 110 Stat. 3009-594. Congress provided that a lawful permanent resident alien is eligible for discretionary cancellation of removal only if he has resided continuously in the United States for seven years after having been lawfully admitted in any status. See 8 U.S.C. 1229b(a)(2) (Supp. IV 1998). Congress also provided, however, in a new rule known as a "stop-time" rule, that the potential qualifying period of continuous residence for cancellation of removal would be deemed to have terminated whenever the alien committed a criminal offense referred to in 8 U.S.C. 1182(a)(2) (1994 & Supp. IV 1998), which sets forth the grounds on which an alien may be denied admission into the United States. See 8 U.S.C. 1229b(d)(1) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new re-

moval procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA —would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined, in Section 306 of IIRIRA, the INA's provisions for judicial review of removal orders. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced the repealed provisions with the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998).

And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of India who was admitted to the United States as a lawful permanent resident alien on September 7, 1988. On June 26, 1995, less than seven years later, he pleaded guilty in New Jersey state court to burglary and felony theft. Pet. App. 10a.

On November 30, 1998, petitioner traveled out of the United States. Upon his return, on December 9, 1998, the INS denied him admission and placed him in removal proceedings based on his 1995 conviction for theft, which is a "crime involving moral turpitude" rendering an alien inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 10a; see *Soetarto* v. *INS*, 516 F.2d 778, 780 (7th Cir. 1975); *Brett* v. *INS*, 386 F.2d 439, 439 (2d Cir. 1967), cert. denied, 392 U.S. 935 (1968); *Matter of De La Nues*, 18 I. & N. Dec. 140 (B.I.A. 1981); *Matter of Scarpulla*, 15 I. & N. Dec. 139 (B.I.A. 1974).[1]

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[1] The grounds for inadmissibility under Section 1182(a)(2) differ from the grounds of deportability under 8 U.S.C. 1227(a)(2) (Supp. IV 1998) in one important respect pertinent to this case. Under Section 1182(a)(2)(A)(i)(I), one conviction for a crime involving moral turpitude, entered at any time, is sufficient to deny an alien admission. Under Section 1227(a)(2)(A)(i) and (ii), however, an alien, to be rendered deportable, must be convicted either of *two*

At a hearing before an immigration judge (IJ), petitioner conceded his removability under Section 1182(a), but sought to apply for discretionary relief from removal, under either the cancellation of removal provisions of Section 1229b, or the old form of relief from deportation under the repealed Section 1182(c). The IJ ruled that petitioner was ineligible for relief under Section 1229b, because under the new stop-time rule of IIRIRA, petitioner had not acquired seven years' continuous residence before he committed his theft offense. Pet. App. 5a. The IJ did not specifically address relief under Section 1182(c) in his written order. The IJ ordered petitioner removed to India. *Ibid.*

The BIA affirmed. The BIA upheld the IJ's determination that, under the IIRIRA stop-time rule, petitioner was ineligible for cancellation of removal under Section 1229b, even though petitioner's offense was committed and his conviction was entered before enactment of IIRIRA. Pet. App. 8a. The BIA also ruled that petitioner was ineligible for relief under former Section 1182(c) because that form of relief was repealed by IIRIRA and is not available in post-IIRIRA removal proceedings. *Ibid.*

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crimes of moral turpitude not arising out of the same scheme of criminal misconduct, or one crime involving moral turpitude within five years after admission for which a sentence of at least one year's imprisonment may be imposed. Petitioner has not contested in this Court, however, that, even though he was a lawful permanent resident alien, the INS properly treated him as an alien seeking admission into the United States and therefore properly charged him with removal under Section 1182(a)(2) rather than Section 1227(a)(2). See Pet. App. 10a (district court noting that petitioner did not contest that he was properly treated as an arriving alien).

3. On September 6, 1999, petitioner filed a petition for review of his final removal order in the court of appeals. Petitioner did not contest that he was an alien, that he had been convicted of a crime involving moral turpitude, or that he was inadmissible under Section 1182(a)(2) based on his theft conviction. Rather, he argued that the BIA erred in holding that (a) IIRIRA's stop-time rule for discretionary relief under Section 1229b and IIRIRA's repeal of former Section 1182(c) were applicable to his case, and (b) he was therefore ineligible for discretionary relief from removal. The government moved to dismiss the petition for review for lack of jurisdiction, contending that the court of appeals' authority to review petitioner's claims was precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), which provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [8 U.S.C. 1182(a)]." On October 21, 1999, the court of appeals granted the government's motion and dismissed the petition for review in a summary order. Pet. App. 18a-19a. Petitioner did not seek review of that order in this Court.

On October 6, 1999, petitioner filed a petition for a writ of habeas corpus in district court, raising essentially the same challenges to his removal order. The government moved to dismiss on the ground that AEDPA and IIRIRA had divested the district courts of authority under 28 U.S.C. 2241 to review the merits of aliens' removal orders, and that any judicial review that remained available to criminal aliens such as petitioner must be had, if at all, in the court of appeals on petition for review. The district court agreed and dismissed the petition. Pet. App. 12a-13a, 16a-17a.

The court of appeals affirmed the district court's dismissal of the habeas corpus petition in a summary order. Pet. App. 1a-2a. The court of appeals did not cite any authority for that disposition, although it may have relied on its recent decision in *Max-George* v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280, which held (*id.* at 198-203) that IIRIRA divested the district courts of authority to review the merits of final removal orders under 28 U.S.C. 2241.

DISCUSSION

Petitioner urges this Court to grant review to decide whether, after the comprehensive changes to the Immigration and Nationality Act (INA) made by AEDPA and IIRIRA, the district courts retain authority under 28 U.S.C. 2241 to review a criminal alien's challenge to the merits of his final removal order. Petitioner correctly points out (Pet. 9) that the courts of appeals have reached differing conclusions on that question. The Fifth Circuit, in *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000), petition for cert. pending, No. 00-6280, and the Eleventh Circuit, in *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (1999), cert. denied, 120 S. Ct. 1529 (2000), have concluded that Congress divested the district courts of such authority. By contrast, the First, Second, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over retroactivity challenge to BIA's determination that alien was ineligible for discretionary relief from removal); *St. Cyr* v. *INS*, No. 99-2614, 2000 WL 1234850, at *3 (2d Cir. Sept. 1, 2000) (same), petition for cert. pending, No. 00-767; *Calcano-Martinez* v. *INS*,

No. 98-4033, 2000 WL 1336611, at *9-*16 (2d Cir. Sept. 1, 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain the claim on habeas corpus); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (same), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the court of appeals' decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[2] In our view, *St. Cyr* is a better vehicle than this case for resolution of that jurisdictional issue, for several reasons. First, the court of appeals in this case did not cite any authority in its unpublished summary order dismissing petitioner's habeas corpus petition. Although the court of appeals reached the same result here as it did in *Max-George*, *supra*, and perhaps intended to rely on *Max-George*, the court did not specifically do so, and this Court, when considering the jurisdictional issue, might therefore

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[2] We are providing petitioner with a copy of our petition in *St. Cyr*. Related jurisdictional issues are also presented in pending certiorari petitions in *Obajuluwa* v. *Reno*, No. 00-523; *Rodriguez* v. *INS*, No. 00-753; *Russell* v. *Reno*, No. 00-5970; and *Max-George* v. *Reno*, No. 00-6280.

benefit from a more fully explicated decision from the court of appeals in the particular case.

Second, our petition in *St. Cyr* also seeks review of the court of appeals' decision on the merits in that case, which independently warrants plenary review in the event that the Court concludes in that case that district courts may exercise jurisdiction under 28 U.S.C. 2241 to review final orders of removal. See 00-767 Pet. 26-30 (*St. Cyr*). This case, however, presents only the issue of jurisdiction under Section 2241, because neither lower court adjudicated the merits of petitioner's challenge to his removal order.

Third, legislation is currently pending before Congress that might afford aliens in petitioner's situation the opportunity to apply for cancellation of removal under Section 1229b, notwithstanding the stop-time rule of Section 1229b(d)(1). Under that legislation, the rule of Section 1229b(d)(1) stopping the qualifying period of continuous residence for cancellation of removal at the date of the commission of the alien's offense would not be applied to any alien whose offense was committed before the enactment of IIRIRA. See H.R. 5062, 106th Cong., 2d Sess. § 1(a)(1) (2000). That bill passed the House of Representatives on September 19, 2000, see 146 Cong. Rec. H7766-H7770, and is pending in the Senate. The bill would not, however, afford the opportunity to apply for cancellation of removal to the alien in *St. Cyr*, who is barred from obtaining cancellation of removal under Section 1229b because he was convicted of a crime that was an aggravated felony even before AEDPA and IIRIRA were enacted. The possibility that Congress might pass legislation while this case is pending that might moot this case, but not *St. Cyr*, presents another reason why the Court should

review the jurisdictional issue in *St. Cyr* rather than this case.

For the foregoing reasons, we suggest that the Court hold the petition in this case pending its disposition of the petition in *St. Cyr*, and then dispose of this petition in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA
Attorneys

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